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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1360

SHEARN MOODY, JR., *Petitioner,*

v.

FLYING SAUCERS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM D. DECKER
MARKWELL, STUBBS, DECKER,
DALEHITE & YOUNGBLOOD
307 Cotton Exchange Building
Galveston, Texas 77550

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Petitioner

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FLYING SAUCERS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case on January 27, 1970.

OPINION AND ORDERS BELOW

The order of the United States District Court for the Southern District of Florida dismissing respondent's complaint and quashing its service of process on

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petitioner was dated April 21, 1969, was filed on April 24, 1969, is not reported, and is printed as Appendix B hereto.

The opinion and judgment of the Fifth Circuit Court of Appeals reversing the District Court's order were rendered on January 27, 1970, are not yet reported, and are printed as Appendix B hereto.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were rendered on January 27, 1970. On February 6, 1970, petitioner filed a timely petition for rehearing, which was denied on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

At each stage of these proceedings, petitioner has relied upon the constitutional and statutory grounds asserted herein.[1]

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the statutory provision involved is Florida Statute § 48.181. Both are printed as Appendix A hereto.

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[1] For example, in his brief on the merits in the Court of Appeals (p. 9), petitioner asserted: "Finally, Appellee respectfully suggests to this Court that to allow Florida to have jurisdiction over this Defendant under its Long-Arm Statute, in the fact situation now before the Court, would violate the Constitutional standards of due process as expressed in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L. ed 2d 223 (1957), and *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L. ed 2d 1283 (1968)."

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QUESTIONS PRESENTED

1. In a diversity case, may a Court of Appeals disregard an entire series of state court decisions (including decisions by the state's highest court) which strictly and narrowly construe the state's long-arm statute, and rely instead, on the theory of stare decisis, upon one of its own prior decisions extending the state statute as far as due process allows?

2. Was it a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for petitioner, an individual and a resident of Texas, to be served in a diversity case brought in Florida by (a) service on the Florida Secretary of State and (b) mail service on petitioner and his attorneys in Texas, where the record does not show that petitioner was ever in Florida, and the sole activities of his agents in Florida consisted of arrangements for the purchase of a single pleasure yacht?

3. May a state long-arm statute be extended as broadly to an individual as it is to a corporation?

STATEMENT

Petitioner is an individual residing in Galveston, Texas (A. 8, 13)[2] and a citizen of Texas (A. 1). Respondent is a Florida corporation with its principal place of business in Miami (A. 1). In April 1968, petitioner spoke with one of respondent's major shareholders about the purchase of an oil screw hydrofoil for $10,000 in cash and 22,500 shares[3] of the capital stock of The Empire Life Insurance Company of

[2] "A" refers to the Appendix filed in the Court of Appeals and in this Court containing the record below.

[3] The Court of Appeals incorrectly stated the figure as 22,000.

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America, an Alabama corporation (A. 4). The record does not show where this conversation took place. In essence, petitioner told the shareholder that subject to a survey, he wanted to buy the vessel, and a trial run was arranged for the following day. Petitioner's agent came from Texas to Florida for the survey, and the vessel was towed down a river for the trial run. The agent authorized a local company to perform miscellaneous repairs to the vessel and to furnish it with supplies (*ibid.*). A captain was employed, who arranged for dockage and maintenance of the vessel and had tentative preliminary plans drawn up for the conversion of the vessel to a pleasure yacht (A. 5). The captain also negotiated with various vendors as to the cost of conversion and the installation of equipment. On May 17, 1968, respondent recorded a bill of sale in Florida (A. 5-6) and thereafter sent the documents necessary for closing the sale to petitioner's attorney in Texas, who acknowledged their receipt (A. 6).

When petitioner declined to complete the purchase, respondent brought a diversity suit in the United States District Court for the Southern District of Florida for the entire amount of the purchase price, alleged to be $157,500. Service of the complaint was attempted by (a) mailing copies (return receipt requested) to petitioner and two of his attorneys, all of whom were in Texas, and (b) filing a copy with the Florida Secretary of State. Petitioner and his attorneys signed the return receipts, and the Secretary of State acknowledged receipt of his copy.

Petitioner objected to the attempted service, and on April 21, 1969, the District Court, citing a number of Florida cases, granted his motion to quash the service

of process and dismissed the complaint for lack of jurisdiction (App. B).

The Fifth Circuit Court of Appeals reversed, relying in part on one of its own decisions interpreting Florida law some three years before, and indicating that no Florida decisions had intervened. Holding that the Florida long-arm statute should be liberally applied and interpreted "as broadly as consistent with due process," the court ruled that petitioner had carried on a "business or business venture" in Florida within the meaning of Florida Statute § 48.181(1) (App. A).

The court also held that when petitioner offered to pay for the yacht partly in cash and partly in stock, this constituted a "sale" of the stock within the meaning of Florida Statute § 48.181(3) (App. A).

ARGUMENT

1. The Court of Appeals laid down a rule of law that cannot be sustained, and it did not even follow the rule it laid down. The court held that while federal courts must look to state court decisions for a construction of a state statute, "where our court has construed such a statute and no intervening state court decision has placed a different construction on it, the rule of stare decisis binds us to our earlier decision just as it does with respect to any other matter with which the court has to deal." It then relied upon a Fifth Circuit case decided three years before,[4] which in turn relied upon still another Fifth Circuit decision

[4] *Phillips* v. *Hooker Chemical Corp.*, 375 F.2d 189 (5th Cir. 1967).

decided in 1964,[5] for the proposition that the Florida long-arm statute "was intended to be applicable to the fullest extent permissible within constitutional limits upon the state's power to act extraterritorially." It found the Florida case most nearly in point to be *William F. Strasser Const. Corp.* v. *Linn*, 97 So.2d 458 (Fla. 1957), a case decided over twelve years prior to the present case and during the very year in which the Florida legislature *amended* the state statute to add one of the two sections relied upon by the Court of Appeals.[6]

We submit that a Court of Appeals in interpreting a state statute is not bound by its own stare decisis but rather is under a continuing obligation to review state court decisions for the evolving meaning of that statute. Otherwise, either state law is determined for all purposes in the federal courts—an improper forum[7]—or state law is determined one way in the state courts

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[5] *Delray Beach Aviation Corp.* v. *Mooney Aircraft Co.*, 332 F.2d 135 (5th Cir. 1964).

[6] Even the reliance on *Linn* was entirely misplaced. There, out-of-state residents, through an agent, engaged the services of a Florida corporation to construct a three-unit apartment house on property which the out-of-state residents owned in Florida. That is hardly comparable to the situation here. Moreover, *Linn* made it clear that the long-arm statute, far from reaching the outer limits of due process, was to be "strictly construed," with the parties invoking the statute carrying "the burden of presenting a situation that clearly justifies the application of the Act" (97 So.2d at 459).

[7] *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Rosenthal* v. *New York Life Ins. Co.*, 304 U.S. 263 (1938); *Six Companies* v. *Joint Highway District*, 311 U.S. 180, 187-188 (1940); *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956); Rules of Decision Act, 28 U.S.C. § 1652.

and another in the federal courts—an equally objectionable result.[8]

In this case, the Court of Appeals, relying on its own decisions of prior years and one obviously out-of-date state court decision, ignored an entire raft of more recent Florida cases making it manifestly and abundantly clear that, far from extending the state's long-arm jurisdiction to constitutional limits, the Florida statute is to be narrowly construed, and the party seeking to rely on constructive service carries a heavy burden of proving that the activities of the party being served clearly come within the statute's restrictive ambit.

Thus, in 1960, an intermediate appellate court in Florida ruled that Illinois residents who engaged a Florida agent to sell Florida property and then signed documents sent to them by their Florida agent, including a purchase money mortgage and an installment note designating a Florida bank as collection agent, were not engaged in a "business" or a "business venture" within the Florida long-arm statute. Quoting from an earlier opinion of the Florida Supreme Court, the intermediate court held:

> The cited statute provides a method of substituted service of process in lieu of personal service. It is therefore necessary that one invoking the provisions of the statute carry the burden of presenting a situation that clearly justifies the applica-

[8] See Note, "In Personam Jurisdiction over Foreign Corporations: An Interest-Balancing Test," XX Univ. of Fla.L.Rev. 33, 41-46 (1967), which points out that very early Florida cases giving a liberal interpretation to the statute were subsequently overruled by "restrictive" decisions narrowly interpreting the State's long-arm jurisdiction.

> tion of the Act. Statutes of this nature are strictly construed and parties seeking to invoke them are required to bring themselves clearly within the provisions of the Act in order to render the substituted service of process effective against the defendants. [*Toffel* v. *Baugher,* 125 So. 2d 321, 323 (Fla. Dist. Ct. App. 1960), cert. discharged, 133 So. 2d 420 (Fla. 1961).[9]]

Five years later, the Florida Supreme Court itself took precisely the same position. It held that the long-arm statute "must be strictly construed and one seeking to effect service under it has the burden of presenting facts which clearly justify its applicability." *Young Spring & Wire Corp.* v. *Smith,* 176 So. 2d 903, 905 (Fla. 1965).

In *Sausman Diversified Investments, Inc.* v. *Cobbs Co.,* 208 So. 2d 873 (Fla. Ct. App. 1968), the fact that

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[9] Similarly, in *Fawcett Publications, Inc.* v. *Rand,* 144 So.2d 512 (Fla. Dist. Ct. App. 1962), *cert. denied,* 155 So.2d 618 (Fla. 1963), the court held service improper on a Delaware corporation with offices in Connecticut even though the company received orders for magazines from Florida wholesalers and distributors who were independent contractors and who bought the magazines for resale to newsstands which in turn sold them to the general Florida public. To the same effect, see *Fawcett Publications, Inc.* v. *Brown,* 146 So.2d 899 (Fla. Ct. App. 1962).

In *Illinois Central R.R.* v. *Simari,* 191 So.2d 427 (Fla. 1966), substituted service of process by a passenger plaintiff against a railroad defendant alleging injuries to the passenger which occurred in an accident outside Florida was held improper even though the railroad maintained two permanent offices in Florida staffed by thirteen permanent employees.

And in *Hayes* v. *Greenwald,* 149 So.2d 586, 587 (Fla. Ct. App. 1963), the court said that "The isolated action of selling a home, by one who moves to another state, does not amount to a business venture within the meaning and intent" of the Florida statute. See *James* v. *Kush,* 157 So.2d 203, 205 (Fla. Dist. Ct. App. 1963), reaching the same result in view of the fact that "the statute should be strictly construed."

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the plaintiff had executed a franchise agreement in Florida and that the defendant nonresident franchisee, which signed the franchise agreement in Pennsylvania, was required under the terms of that agreement to permit the plaintiff to supervise its activities, supply it with merchandise, direct its operations, and do various other supervisory acts in Florida did not mean that defendant was "doing business" within Florida. The court held that the long-arm statute "should be strictly construed and that the party seeking to invoke its benefits has the burden of clearly showing that the situation presented justifies the application of the statute."

In *Kastan* v. *Kastan,* 222 So. 2d 55 (Fla. Dist. Ct. App. 1969), *cert. denied,* 226 So. 2d 818 (Fla. Supreme Ct. 1969), the court held a foreign corporation not amenable to the state long-arm statute despite the fact that the corporation entered into a franchise agreement with a Florida land developer for the sale in foreign countries of lands within the state of Florida under installment sales contracts. The statute, said the court, "must be strictly construed, and the burden of presenting a situation that clearly justifies its application is upon the one attempting to invoke the long-arm statute's provisions" (222 So. 2d at 57).

As recently as November 25, 1969 (two months before the Court of Appeals' opinion), the Supreme Court of Florida further restricted the state's long-arm statute. In *DeVaney* v. *Rumsch,* 228 So. 2d 904 (Fla. 1969), the Court specifically held that § 48.181 requires that the party to be constructively served must have engaged in activity within the State for pecuniary gain. It ruled:

> We hold the intent of the Legislature in enacting Florida Statute § 48.181, F.S.A., to be that any individual or corporation who has exercised

> the privilege of practicing a profession or otherwise dealing in goods, services or property, whether in a professional or nonprofessional capacity, within the State *in anticipation of economic gain,* be regarded as operating a business or business venture for the purpose of service under Florida Statute § 48.181, F.S.A., in suits resulting from their activity within the State. As indicated in *Matthews* v. [*Matthews,* 122 So. 2d 571, 573 (Fla. App. 2nd 1960)] the activities of the person sought to be served must be considered "collectively" and show a general course of employment and conduct of carrying on business activity in the State for *pecuniary benefit.* [*Id.* at 907; emphasis added.]

By no possible stretch of the imagination could the alleged purchase of this yacht for pleasure purposes be said to constitute activity engaged in for pecuniary gain.

As for the holding by the Fifth Circuit that when petitioner offered to pay for the yacht partly in cash and partly in stock, this constituted a *sale* of the stock so as to come within Florida Statute § 48.181(3),[10] this simply will not stand analysis and is directly and flatly contrary to Florida law as interpreted by the Florida courts. In the first place, the "sale" was not through "brokers, jobbers, wholesalers or distributors", as unequivocally required by the statute. Secondly, as the Fifth Circuit itself asserted on a different occasion:

> The argument that the execution of a promissory note by Landstreet's group and its delivery in

[10] In pertinent part: "Any person * * * which sells * * * by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person * * * in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state."

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> Florida where it was to be performed constitutes a business venture within the contemplation of section 47.16 Florida Statutes, F.S.A., may be disposed of summarily. The Florida courts have held the contrary, *Odell* v. *Signer,* Fla. App. 1964, 169 So. 2d 851, 853; aff'd, *Signer* v. *Odell,* Fla. 1965, 176 So. 2d 94; and so must we, e.g., *Monarch Ins. Co. of Ohio* v. *Spach,* 5 Cir. 1960, 281 F. 2d 401.
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> * * *
>
> The evidence is undisputed that Landstreet's group purchased Uible's stock and held it as a personal investment to make a profit. As shown above, the stock purchase alone is insufficient to bring Landstreet's group within the reach of the statute. [*Uible* v. *Landstreet,* 392 F. 2d 467, 470 5th Cir. 1968).]

If the execution of a promissory for a purchase could not be a business venture, it is impossible to see how a promise to pay shares of stock as part of a purchase could be a business venture.

Despite all of these cases, the Fifth Circuit ruled that "no intervening state court decision has placed a different construction" on the Florida long-arm statute since 1964, when the court, misreading a 1957 case, held that the Florida courts have "given a liberal application in actual practice" to the statute and have construed it "as broadly as consistent with due process."

We say that the Fifth Circuit was in error. But more importantly, the Fifth Circuit overstepped the narrow lines this Court has drawn around the extent to which federal courts, in attempting to interpret state law, can disregard the statutory reading by the state's own courts and instead interpolate a *federal*

meaning into state law. This is no narrow issue. Increasingly in recent years, complaint has been made to this Court about the practice in some circuits of disregarding or circumventing state law in cases in which state law properly controls. We recognize the natural reluctance of this Court to accept such cases, but surely in a case as blatant as this one, the circuit courts need a reminder that the delicate balance of federal-state relations, already strained in some areas where strain cannot be avoided, should not be put under further stress by the type of ruling rendered in this case.

2. Even assuming that the Court of Appeals was correct in its assumption that the Florida long-arm statute is as broad as due process allows, it erred in holding that due process allows the type of service effected in this case in the light of petitioner's less-than-minimum contacts with the state.

This record does not show that petitioner was ever in the State of Florida. So far as the record reveals, he could have had his conversation with respondent's shareholder in Texas or over the telephone. The subsequent activities of petitioner's agents were of an extremely limited nature and entirely addressed to the preparation for sale of a single yacht to be used for pleasure purposes. There was no continuous course of activity over an extended period of time. There was no activity that looked to permanent or even continuous transactions in Florida—as where products are sold to various residents of the state, or structures are built on property within the state. This was, in effect, a single transaction, conducted through agents,

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for the removal of a single object to be used for personal reasons, and not for business or gain. Even under the decisions involving corporations, these facts would not support service by mail and on the Secretary of State.[9]

But petitioner is an individual, not a corporation. The Court of Appeals has treated the two as equivalent, as indicated by the test it uses of "doing business" and the cases it cites. The distinction between individuals and corporations is vital and should be maintained by this Court. It was established by *Peunoyer* v. *Neff*, 95 U.S. 714 (1877), and carried forward by *Flexner* v. *Farson*, 248 U.S. 289 (1919), which has never been overruled. As distinguished commentators have said:

> It is questionable whether the fundamental premise of the [Virginia] act, *i.e.*, that the due process requirements for valid personal jurisdiction over individuals are now the same as those for corporations, will be sustained by the courts.
>
> ***
>
> There are obvious distinctions in fact, as there have been traditional distinctions in law [between individuals and corporations]. The historical basis of in personam jurisdiction over the individual was physical power over him. Indeed, this was tangibly demonstrated by the service of writs in which the sheriff took the defendant into cus-

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[9] *E.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *Perkins* v. *Benquet Construction Co.*, 342 U.S. 437 (1952); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson* v. *Denckla*, 357 U.S. 235 (1958) (involving the Florida statute); *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961).

tody and brought him bodily before the court. In time, the requirement of body attachment was gradually abandoned as the test of jurisdiction and replaced by the test of the individual's physical presence within the territorial jurisdiction of the court. Since corporations are "metaphysical" or "fictional persons," they cannot be physically present anywhere. So traditionally a state obtained jurisdiction over foreign corporations on the theory that a certain amount of activity in the state by employees and agents of the corporation made it "present" within the state. This theory is known as the "doing business" test. Once a corporation is found to be "doing business" within the state, the legal consequences in terms of amenability to suit are precisely the same as where an individual is found to be physically present within the state. The foreign corporation "doing business" may thus constitutionally be sued in the courts of that state on any cause of action, without regard to whether or not the state has any connection with that particular cause of action.

***

*** But in any event, it seems that cases defining "transacting business" as the test of corporate "presence" for purposes of service of process and venue have no relevance where individuals are involved, since metaphors are unnecessary to determine whether an individual is present or not present. [Gibson and Freeman, "Business Associations," 50 Va.L.Rev. 1265, 1272-73, 1275 (1964).]

We respectfully urge the Court to grant certiorari, settle this issue of long-arm jurisdiction over indi-

viduals as opposed to corporations, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

WILLIAM D. DECKER
MARKWELL, STUBBS, DECKER,
DALEHITE & YOUNGBLOOD
307 Cotton Exchange Building
Galveston, Texas 77550

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Attorneys for Petitioner